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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1966

No. 1066

ROBERT W. ALBERS,
Petitioner,

vs.

STATE BOARD OF EQUALIZATION
STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the District Court of Appeal, State of California,
First Appellate District, Division Two

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Subject Index

	Page
Jurisdiction	2
Questions presented	2
Statement of the case	3
The federal question was raised in substantial compliance with the rules of this court	4
We submit the following authorities which sustain the jurisdiction of the Supreme Court of the United States	6
Prayer	10

Table of Authorities Cited

Cases	Page
Braniff Airways v. Nebraska St. Bd. Eq., 347 US 590 (74 S Ct 757)	8
Cramp v. Board, 368 US 278 (82 S Ct 275)	9
Dept. Mental Hygiene v. Kirchner, 60 C 2d 716, 388 P 2d 720	9
Ellis v. Dixon, 349 US 460 (75 S Ct 850)	8
Gideon v. Wainwright, 372 US 335 (83 S Ct 792)	5
Hoeper v. Tax Com., 248 US 206 (76 L Ed 248)	9
Marranville v. Board, 99 CA 2d 841, 222 P 2d 898	2
New York v. Zimmerman, 278 US 63 (49 S Ct 63)	7
Rogers v. Alabama, 192 US 226 (48 L Ed 417)	7

Constitutions

United States Constitution:	
Fifth Amendment	2
Fourteenth Amendment	2

Rules

Rules of the Supreme Court of the United States, Rule 23(c)	3

Statutes

28 U.S.C.A., Section 1257 (2) and (3)	2

Texts

Stern & Gressman (3rd Ed.), Chapter 3, Sections 3-20 et seq., page 97	6

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Robert W. Albers prays that a Writ of Certiorari issue to review the Decision of the District Court of Appeal, First Appellate District, Division Two, made October 18, 1965, after which a hearing was denied in Bank by the Supreme Court of the State of California on December 15, 1965.

The said written opinion has not as yet been printed in the California Appellate Reports, and the same is set out haec verba in Appendix A hereinafter.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1257 (2) and (3) and the Due Process Clauses of the Fifth and the Fourteenth Amendments to the United States Constitution.

QUESTIONS PRESENTED

Petitioner raised the *due process clause* (of the 14th Amendment) by written brief filed in pretrial Court, and later raised the same question orally at the beginning of the proceedings in the Trial Court, and no objection was made by opposing counsel at that time as to any impropriety extant in the prior proceedings.

The Federal Question was raised, because California Courts have held in the *Marranville* case, 99 CA 2d 841, 222 P 2d 898:

> "The rules of an agency (identical board) empowered to tax, which result in *illegal discrimination are void.*"

We proved at Trial Court level that the rule of Appellee Board resulted in illegal discrimination because it taxed Petitioner and exempted all other draftsmen, because he was an independent and they were employees.

When the District Court of Appeal reversed the trial court and held the tax to be good against Petitioner, and evaded the federal question of due process, Petitioner suffered an injury of unequal taxation, resulting in unfair competition.

The Order of the pretrial conference was broad enough to "be deemed to include every subsidiary question fairly comprised therein" (Rules of the Supreme Court of the United States 23 (c)).

The said District Court of Appeal then swept the Due Process clause under the rug as follows:

> ". . . The Board's attorney then commented that 'I was handed a brief of Amicus Curiae, and which I noticed one of the headings is something about constitutionality'."

No Motion was ever made to amend the pretrial conference order to include any additional issue.

> "If any party or the court deems it (pretrial order) insufficient or incorrect, it may be modified at any time before trial . . . It may not be ignored. It limits the trial issues (citing California Appellate cases)."
>
> "We find no reason to extend our decision herein beyond the issue presented in the record."

STATEMENT OF THE CASE

Petitioner Robert W. Albers has been an independent draftsman all of his life. Up and until 1957 Appellee Board ruled he was rendering a service not producing tangible personal property. At that time it

taxed all independent draftsmen exempting all draftsmen doing the same work for the same hourly wage scale but employed by architects, engineers and others. He was assessed eight years back taxes which now amount to some $3,000.

The Due Process clause was raised by written brief filed with the clerk before the pretrial conference, and later was raised orally before the time of trial. The Trial Judge Arnold then held against the Board, that Petitioner was a professional man not producing tangible personal property.

From this the Board appealed, and the District Court of Appeal reversed, and refused to entertain the Federal Question on the grounds of the color of local procedure, pretrial conference rules.

The Supreme Court of the State of California denied a hearing in Bank (Appendix B) which judgment was made and entered December 15, 1965.

From this judgment Petitioner appeals to the Supreme Court of the United States.

THE FEDERAL QUESTION WAS RAISED IN SUBSTANTIAL COMPLIANCE WITH THE RULES OF THIS COURT

The Due Process clause was raised by Mr. Michael Fitzpatrick, Amicus, who filed a brief in pretrial conference, as follows (p. 4, line 2):

> "To construe the statute as applying to plaintiff would be unconstitutional as a denial of the principle of Due Process of Law."

Mr. Lemuel D. Sanderson, in one of his opening statements which the reporter did not record, raised the Constitutional question, and the Judge agreed that it must be raised at the time of trial, and he pressed the federal issue all during the trial (RT 24):

> "We are trying to make this point; these people are not taxed, draftsmen who work by the hour but for consulting engineers, do the same work do not get taxed, and we say that this is *discrimination.*"

Judge Arnold followed it up by asking Mr. Klee, attorney for the Board:

> "If some hired employee working for some architect of the City or State who is a draftsman, he is not taxed on his work?"

The Board is estopped to deny petitioner's right to raise the constitutional question as Mr. Klee raised it himself on cross-examination of Mr. Albers (RT 34):

> "when you stated that you had been into other engineering offices and architects' offices and had seen draftsmen in the same category as you. . . . You mean by that, they were doing the same sort of drawing?
>
> Mr. Albers: Yes. The only difference was that they were doing it for a definite employer constantly for weeks or months. My clients would come in one at a time . . . one particular job to do."

The *Gideon* case (*Gideon v. Wainwright,* 372 US 335, 83 S Ct 792) affirms our position that a substan-

tial compliance with the rules is enough to raise the question. Mr. Anthony Lewis, in his scholarly review of this case in The New Yorker April 25, May 2, and 9, 1964 sums it all up very briefly,

> "In the morning mail January 8, 1962 the Supreme Court received a large manila envelope from Clarence Gideon in forma pauperis. Gideon had used a pencil and his punctuation and spelling were full of surprises. But he had *substantially complied with the rules.*
>
> (Gideon did not raise it at the earliest possible time (arraignment) but at the time of trial.)
>
> "All justices pass upon all applications for certiorari. Given the difficulty of processing these applications the Court might well be expected *not* to try very hard to find the occasional needle in the haystack. But as Justice Walter Schaffer of the Illinois Supreme Court said in a similar context, 'It is not the needle we are looking for in these stacks of paper, *but the rights of a human being.*'"

WE SUBMIT THE FOLLOWING AUTHORITIES WHICH SUSTAIN THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES:

Stern & Gressman, 3rd Ed, Chapter 3, sections 3-20 et seq. at page 97:

> "Only when such rules are applied as a *pretense to avoid* a federal constitutional issue or in a manner that *discriminates* against the *assertion* of Federal claims will the Court ignore or *override* these state procedural requirements."

Rogers v. Alabama, 192 US 226, 230 (48 Law Ed 417):

Justice Holmes:

"A motion setting up a constitutional right, and distinctly claiming it, cannot be withdrawn from consideration of this court, under the *color of local practice.* The exercise of jurisdiction by this Court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to *deny* the right. This Court will decide for itself whether the contract was made or whether the obligation has been impaired.

. . . whether that ground was a real one or set up as an *evasion,* and merely to give *color* to a refusal to allow the bar of the decree."

New York v. Zimmerman, 278 US 63 (49 S Ct 63, 66, 67):

"there are many ways in which the validity of a State Statute may be drawn in question on the ground it is *repugnant to the Constitution.*

"No particular form or words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the State Court with fair precision and in due time. *But* if the record shows either *expressly or by clear intendment* that this was done, the claim is regarded as having been adequately presented.

"Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been in direct terms if the *necessary* effect of the judgment has been to *deny the claim,* that is enough.

"The petition while asserting that the State Statute was *'unconstitutional'* contained no mention of any *constitutional provision* state or federal. (63) The opinion delivered by the Court of first instance was similarly indefinite."

Braniff Airways v. Nebraska St. Bd. Eq., 347 US 590, 599 (74 S Ct 757).

"Upon relying upon the *Commerce Clause* and not specifically claiming protection under the *Due Process Clause* of the Fourteenth Amendment, Appellant names the *wrong* Constitutional clause to support its position.

However Appellant raised and presented its contention . . . though *inexplicit* we consider the *Due Process Clause* within the clear intendment of such contention, and hold such issue sufficiently presented."

Ellis v. Dixon, 349 US 460, 464 (75 S Ct 850):

"It is established law that this Court is *not* finally concluded by the State Court's determination as to the *sufficiency* of a pleading asserting a Federal right.

"Some of the cases suggest our review is limited to determining whether the State Court has *bypassed* the Federal right under *forms of local procedure* . . .

"Other cases indicate we should accept jurisdiction and decide the sufficiency of the pleading ourselves.

"In the present case the route which we travel would make no difference in the result. . . . *Denied.*

"The Chief Justice, Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Clark dissent, feeling that the allegations of the petition are sufficent to state a case of discrimination under the Equal Protection Clause."

Cramp v. Board, 368 US 278, 283, 284 (82 S Ct 275):

"Whether Appellant has standing to attack the State statute in this Court is however a separate issue, to which we must bring our *independent* Judgment . . .

"The controlling question is whether the Appellant has sustained or is in immediate danger of sustaining some direct *injury* as the result of (the Statute's) enforcement (*Mass v. Mellon,* 262 US 477, 488).

"There is nothing in the allegations of the complaint to indicate appellant *will not* be subject to these hazards.

"We conclude that appellant is not without standing to attack the Florida Statute on the ground that it is so vague as to deprive him of liberty or property without *due process of law.*"

Hoeper v. Tax Com., 248 US 206 (76 L Ed 248):

"The State is forbidden to deny *due process of law* or the *equal protection* of the laws, for any purpose whatsoever . . ."

The California Supreme Court after quoting the above in *Dept. Mental Hygiene v. Kirchner,* 60 C 2d 716, 388 P 2d 720 at 722 said:

"A statute obviously violates the Equal protection clause if it selects one particular class of persons for a species of taxation and no rational basis supports such classification.

(722) Such a concept for the state's taking of a free man's property manifestly denies him equal protection of the law."

PRAYER

Wherefore Petitioner Robert W. Albers, prays this Court that his petition for a Writ of Certiorari herein should be granted.

Dated, San Francisco, California,
February 25, 1966.

LEMUEL D. SANDERSON,
HUGH T. FULLERTON,
Attorneys for Petitioner.

(Appendices A, B and C Follow)

Appendix A

In the District Court of Appeal
State of California
First Appellate District

DIVISION TWO

1 Civil No. 22,603

Robert W. Albers,
Plaintiff and Respondent,
vs.
State Board of Equalization of the State of California, et al.,
Defendants and Appellants.

OPINION

The lower court ordered defendant Board of Equalization to refund $55.57 to plaintiff, paid by him as sales tax on transactions of the type described below. The Board appeals.

The facts are not in dispute and the sole issue is whether such transactions are taxable as sales of tangible personal property within the meaning of the California Sales and Use Tax Law. (Revenue and Taxation Code, § 6001, et seq.)[1]

Plaintiff is a self-employed commercial draftsman who maintains his own office. He makes detailed draw-

[1]All section references are to this code.

ings for architects, engineers and business firms based upon specifications and other data furnished by the person or firm placing the order.

Plaintiff's charges are based upon the time actually spent by him in producing the drawings and are computed at a straight hourly rate.

The drawings are made on paper which is either furnished by the customer or by the plaintiff. In either instance, the drawing bears the name of the customer, not that of plaintiff, and becomes the customer's property upon completion and delivery.

Plaintiff is not an architect and none of the concepts, ideas or designs depicted in the drawings produced by him are of his own determination. Neither is plaintiff an engineer nor are any of the specifications or other details shown in such drawings determined by him.

The portion of section 6006 which is specifically applicable herein is: " 'Sale' means and includes: . . . (f) A transfer for a consideration of the title or possession of tangible personal property which has been produced, fabricated, or printed to the special order of the customer. . . ."

People v. Grazer (1956) 138 Cal.App.2d 274, held this provision to be applicable to the following facts: "that during the tax period[2] Grazer was engaged in the business of taking X-ray pictures of persons referred to him by physicians and surgeons; that he

---

[2]This period *ended* on June 1, 1951, the effective date of section 6019, which provided: "Producers of X-ray films for the purpose of diagnosis are the consumers of materials and supplies used in the production thereof." This section was renumbered § 6020 in 1953.

employed a qualified radiologist to read the X-ray pictures and to report his findings to the referring physician; that the pictures were at all times the property of Grazer and were always kept in his possession except during any period that a picture ordered by a physician was taken out of Grazer's laboratory for the purpose of examination by the physician who had ordered it; that the pictures were always returned to Grazer when the physician had completed his use thereof in connection with past treatment; that Grazer kept the pictures on file in his laboratory at all other times; that Grazer took no pictures except on request of a licensed physician, surgeon, dentist or osteopath and never delivered a picture directly to a patient for his use; . . . that the fee charged by him was principally for services performed in picture taking and developing, and in the payment of the fees of the radiologist to report his findings to the referring physician or surgeon; that the cost of the materials and supplies used in taking the pictures was only a small part of the total charge made by Grazer for picture taking, producing, developing and for the radiologist's report thereon; that Grazer never read or reported on any X-ray picture taken by him; . . ."

A judgment holding that no sales tax was due or payable was reversed, the appellate court stating: "To be sure, the raw materials consumed in producing that which he ordered may have cost the laboratory only a very small part of the charge made. The expense of the producer of the pictures is almost entirely the cost of the skilled services of the radiologist and the technicians and the use of equipment which is gen-

erally quite costly. But the price charged for all taxable transfers is more often than not largely a charge for services rendered in connection with the tangible object transferred. That Grazer retained title to the pictures is immaterial. The tax is also laid upon a transfer of possession and the evidence shows and the court found that these pictures served the only purpose for which they were required when they passed into the possession of those who ordered them for use in diagnoses and treatment of their patients. This was such an effective transfer of possession as to justify the imposition of the tax."

The facts in Grazer are closely parallel to the facts in the instant case. In each, *the true object of the transaction* is the finished article, the X-ray film in Grazer and the drawing in the instant case.

Plaintiff herein was not paid to conceive or to dictate any of the ideas, concepts, designs, or specifications in the drawings made by him. He simply applied his ability to the details supplied by the customer for the purpose of putting such details down on paper and thereby producing a drawing for use by the customer. In other words, the customer was purchasing the detailed drawing for his use, he was not purchasing the design or specifications pictured in the drawing.

We hold that the transactions involved in the instant case are sales of tangible personal property within the meaning of section 6006. This conclusion finds support in the decided cases of other jurisdictions having sales tax statutes similar to ours. (District of Columbia v. Norwood Studios, Inc.

(1964) 336 F.2d 746; Glushak v. City of New York (1958) 178 N.Y.S.2d 33; Green v. Sgurovsky (Fla., 1961) 133 So.2d 663.)

In the order cited, these cases involve (1) production of a series of motion pictures for television showing, (2) pictorial representations of proposed buildings from plans furnished by builders and architects, and (3) "renderings" of artist, consisting of bristol board representations from sketches and designs submitted to him by architects, builders and advertising agencies.

The trial court's findings of fact, conclusions of law, and judgment are confined to the *sole* issue set forth in the pretrial conference order, to-wit: "Did the plaintiff in conducting his business make sales of tangible personal property within the meaning of Section 6006 of the Revenue and Taxation Code."

Plaintiff's counsel concluded his opening statement at the hearing below by stating: "Anyway, that is the gist of this thing, whether Mr. Albers is producing something that is taxable under the sales tax, and I would like to put Mr. Albers on the stand."

The Board's attorney then commented that "I was handed a brief of amicus curiae and which I noticed one of the headings is something about constitutionality. And in that regard I would like to say in my opening statement as to what the issue is, to simply read from the pre-trial order which sets forth the issue, and that is: 'Did plaintiff in conducting his business make sales of tangible personal property within the meaning of Section 6006 of the Revenue and Taxation Code?' "

Thus, counsel were expressly advised of the Board's position that the hearing was to be confined to this one issue. The only evidence presented at the trial was the testimony of the plaintiff, six examples of his drawings and a letter from the Board, after its representatives had investigated the matter, stating that "we have concluded that . . . Mr. Albers is a retailer of the drawings and that his total receipts for making the drawings are subject to the tax."

No motion was *ever* made to amend the pretrial conference order to include any additional issue. "If any party or the court deems it [the pretrial order] insufficient or incorrect, it may be modified at any time before trial under the ample provisions made in the rules therefor.[3] It may not be ignored. It limits the trial issues." (Thompson v. Guyer-Hays, 207 Cal. App.2d 366, 372; Oliver v. Swiss Club Tell, 222 Cal. App.2d 528, 541.)

We find no reason to extend our decision herein beyond the issue presented by the record. The judgment is reversed.

Agee, J.

We Concur:

Shoemaker, P.J.

Taylor, J.

Filed October 18, 1965,
Lawrence R. Elkington, Clerk.

---

[3]Rule 216, California Rules of Court, provides: "When filed, the pretrial conference order becomes a part of the record in the case and, where inconsistent with the pleadings, controls the subsequent course of the case unless modified at or before trial to prevent manifest injustice. Any motion so to modify before trial shall be heard by the pretrial conference judge or, if not available, before the presiding judge or, if none, before any judge sitting in that court."

Appendix B

Order Due
December 17, 1965

In the Supreme Court of the State of California
In Bank

Albers

v.

State Board of Equalization et al.

ORDER DENYING HEARING

After Judgment by District Court of Appeal
1st District, Division 2, Civil No. 22603

Respondent's petition for hearing DENIED.

Traynor,
Chief Justice.

Filed Dec 15 1965
William I. Sullivan, Clerk

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 20th day of January A.D. 1966.

William I. Sullivan, Clerk
By Thompson
Deputy Clerk

Appendix C

Constitution of the United States

Fourteenth Amendment, Section 1.

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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ROBERT W. ALBERS,
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vs.

STATE BOARD OF EQUALIZATION STATE OF CALIFORNIA,
Respondent.

Brief in Opposition

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SUBJECT INDEX

	Page
Argument	2
I. There Is No Basis for Jurisdiction in This Court	2
II. The Tax Here in Question Is Clearly Constitutional	2
Conclusion	3

TABLE OF AUTHORITIES CITED

CASES

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 437	3
Ferguson v. Georgia, 365 U.S. 570	2
In re Lamkin, 355 U.S. 59	2
Irvine Company v. McColgan, 26 Cal.2d 160, 157 P.2d 847	3
Thompson v. Guyer-Hays, 207 Cal.App.2d 366, 24 Cal.Rptr. 461	2
Williams v. Georgia, 349 U.S. 375	2

OTHER AUTHORITIES

California Revenue and Taxation Code, Section 6006	2
California Rules of Court, 216	2

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1066

ROBERT W. ALBERS,
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vs.

STATE BOARD OF EQUALIZATION STATE OF CALIFORNIA,
Respondent.

Brief in Opposition

Respondent, State Board of Equalization of the State of California, opposes the petition for certiorari for the following reasons:

1. *There is no basis for jurisdiction in this court.* The federal issue which petitioner seeks to raise here was not properly raised in the state proceedings and was not passed on by either the trial court or the appellate court.

2. *There is no merit whatsoever to petitioner's claim.* There is nothing unconstitutional in imposing a sales (gross receipts) tax on the receipts of an independent contractor arising from the retail sale of tangible personal property while not imposing the tax on the wages of employees who are not engaged in the business of selling at retail.

ARGUMENT

I. There Is No Basis for Jurisdiction in This Court

This is a suit brought by petitioner seeking the refund of an amount paid to the state as sales tax. Pursuant to the Pre-trial Conference Order, the sole issue in the case was one of statutory construction of the California Sales and Use Tax Law, namely, whether in conducting his business, petitioner was making "sales" within the meaning of section 6006 of the California Revenue and Taxation Code. (Clerk's Transcript, page 24.) Petitioner at no time sought to have the order amended.

Under California law, the pre-trial conference order supersedes the pleadings and controls the issues to be litigated. California Rules of Court, 216; *Thompson v. Guyer-Hays,* 207 Cal.App.2d 366, 24 Cal.Rptr. 461. Accordingly, the trial court properly passed on only the statutory issue and the appellate court properly refused to consider questions not raised by the record.

By failing to properly raise his federal argument in the state proceedings, petitioner cannot set forth any grounds for jurisdiction in this Court. *In re Lamkin,* 355 U.S. 59; *Ferguson v. Georgia,* 365 U.S. 570; *Williams v. Georgia,* 349 U.S. 375.

II. The Tax Here in Question Is Clearly Constitutional

Petitioner is a "commercial draftsman" who produces drawings for his customers for a consideration. The District Court of Appeal held that the production and transfer of possession of a drawing was a "sale" within the statutory definition of "sale" and the gross receipts received by petitioner from such sales were subject to the California Sales tax.

Petitioner apparently contends that there is an unlawful discrimination because the state does not apply the sales

tax to the wages of individuals who, *as employees,* make drawings for their employers similar to those made by petitioner *as an independent contractor* for his customers. There is no merit to that contention. Petitioner, as an independent contractor, constituted a sole proprietorship—a separate business entity. Under California law he was a retailer engaged in selling tangible personal property and was taxable on the exercise of this privilege. An employee, on the other hand, is not engaged in an activity separate from that of his employer and is not considered a separate business entity. *Irvine Company v. McColgan,* 26 Cal.2d 160, 157 P.2d 847. The classification of an individual's rights and duties by whether he is an independent contractor or an employee is one of the oldest, most fundamental concepts in the common-law and statutory law of this country. It cannot now be argued that the classification is not a reasonable one. There is no unlawful discrimination if the legislative classification is at all reasonable. *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 437.

CONCLUSION

For both of the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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